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No. 99-1049

In the Supreme Court of the United States

DATALECT COMPUTER SERVICES, LTD., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the finding of the Court of Federal Claims that petitioner, a government contractor, failed to make an adequate showing of damages in this breach of contract action.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is unreported. The opinion of the Court of Federal Claims on damages (Pet. App. 16a-35a) is reported at 41 Fed. Cl. 720. The opinion of the Court of Federal Claims on liability (Pet. App. 36a-65a) is reported at 40 Fed. Cl. 28.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1999. A petition for rehearing was denied on September 21, 1999 (Pet. App. 66a-67a). The petition for a writ of certiorari was filed on December 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States Army awarded petitioner a fixed-price-per-call requirements contract for repair and maintenance of the Army's desktop computers in Europe. Pet. App. 2a-3a, 17a. The solicitation for the contract contained estimates of repair frequency that were based on the volume of service calls the Army made under prior contracts. *Id.* at 2a-3a. The contract itself contained a provision stating that the actual call volume could vary from the estimates. During contract performance, petitioner complained that the volume of service calls was lower than the Army had estimated. Petitioner submitted a claim for the difference between the actual and estimated call volume. *Id.* at 4a.

Petitioner's claim contained three general allegations: (1) the Army was negligent in preparing the estimates contained in the contract solicitation; (2) the Army breached its contract with petitioner by having Army personnel perform some maintenance on the Army's computers; and (3) the Army breached its contract with petitioner by using the extended manufacturers' warranties that came with the purchase of their computers. Pet. App. 4a-5a. The contracting officer denied petitioner's claim, and petitioner filed this action in the Court of Federal Claims. *Id.* at 18a.

On cross motions for summary judgment on liability, the court held against petitioner on all but its negligent estimates claim. Pet. App. 64a. The court held that the requirements clause of the contract did not oblige the Army to call on petitioner to address every computer malfunction. Rather, the court held that the contract required the Army to use petitioner's services whenever it decided that it needed to *purchase* computer repair or maintenance services. Accordingly, the court

held that the Army did not breach the contract by using manufacturers' warranties and by performing its own minor maintenance. *Id.* at 58a-63a. The court also held that the Army's workload estimates were "faulty" because the Army failed to discuss in the solicitation (or subsequently to adjust its estimation in light of) known factors that would likely reduce service call volume. *Id.* at 48a-55a. Following a one-week trial on damages, the court determined that petitioner had not adequately established what damages resulted from the Army's faulty estimates. *Id.* at 16a-35a. Accordingly, the trial court entered judgment for no damages.

2. Petitioner appealed on both the liability and damages issues. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-15a. As relevant here, the court affirmed the trial court's judgment as to damages on the faulty estimates claim. Specifically, the court held that petitioner failed to offer adequate evidence of financial harm caused by the Army's faulty estimates. *Id.* at 12a-15a. While recognizing that petitioner was not required to prove its damages with certainty, the court concluded that "the flaws in [petitioner's] proof of damages went beyond lack of mathematical precision. The problem is that [petitioner's] damages evidence was not sufficiently related to the only breach at issue, the government's negligent estimates." *Id.* at 12a.[1]

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[1] The court of appeals also affirmed the trial court's holding that the Army did not breach the contract by performing its own computer maintenance, Pet. App. 6a-9a, and vacated the trial court's holding that the Army did not breach by using the extended manufacturers' warranties on the computers. *Id.* at 9a-12a. As to the latter, the court found it unclear from the record whether the Army "purchased" extended warranty service in violation of the requirements clause in the contract. It remanded

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ARGUMENT

Petitioner contends that the unpublished decision of the court of appeals is both erroneous and inconsistent with decisions of this Court and other courts of appeals, insofar as it was based on a finding that petitioner's "damages evidence was not sufficiently related to the * * * government's negligent estimates." Pet. App. 12a. Petitioner's contentions are without merit.

1. The decision of the court of appeals does not conflict with any decision of this Court. As a general rule, once a plaintiff has established liability, it need not prove the precise quantum of its damages with absolute certainty. See *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981); *Palmer* v. *Connecticut Ry. & Lighting Co.*, 311 U.S. 544, 561 (1941); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562-563 (1931); *San Carlos Irrigation & Drainage Dist.* v. *United States*, 111 F.3d 1557, 1563 (Fed. Cir. 1997). Consistent with that general rule, the court of appeals in this case observed that "the amount of [petitioner's] damages need not be proved with certainty and * * * a fair and reasonable approximation should be accepted by the trial court." Pet. App. 12a (citing *S.W. Elecs. & Mfg. Corp.* v. *United States*, 655 F.2d 1078, 1088 (Ct. Cl. 1981)).

It is equally well established, however, that contract law precludes recovery for speculative damages. See *Story Parchment Co.*, 282 U.S. at 562-563. Although that rule pertains to contract law in general, the Federal Circuit has long applied it strictly in government contract cases. See *San Carlos*, 111 F.3d at 1563; *Wells Fargo Bank, N.A.* v. *United States*, 88 F.3d 1012, 1021

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for resolution of that issue. *Id.* at 2a. Those aspects of the court of appeals' decision are not at issue before this Court.

(Fed. Cir. 1996), cert. denied, 520 U.S. 1116 (1997); *Northern Helex Co.* v. *United States*, 524 F.2d 707, 720 (Ct. Cl. 1975), cert. denied, 429 U.S. 866 (1976); *William Green Constr. Co.* v. *United States*, 477 F.2d 930, 936 (Ct. Cl. 1973), cert. denied, 417 U.S. 909 (1974); *Specialty Assembling & Packing Co.* v. *United States*, 355 F.2d 554, 567-568 (Ct. Cl. 1966); *Dale Constr. Co.* v. *United States*, 168 Ct. Cl. 692, 738 (1964); *Ramsey* v. *United States*, 101 F. Supp. 353, 357 (Ct. Cl. 1951), cert. denied, 343 U.S. 977 (1952); see also Lionel M. Lavenue, *Survey of Government Contract Cases in the United States Court of Appeals for the Federal Circuit: 1997 in Review*, 47 Am. U. L. Rev. 1393, 1461-1462 (1998) ("[W]hereas speculative damages are generally not recoverable against private parties, this rule is strictly enforced in government transactions."). As the predecessor to the Federal Circuit explained, in government contract cases "[r]ecovery of damages for a breach of contract is not allowed unless acceptable evidence demonstrates that the damages claimed resulted from and were caused by the breach." *Boyajian* v. *United States*, 423 F.2d 1231, 1235 (Ct. Cl. 1970). In accordance with that well-established rule, the court of appeals in this case concluded that petitioner's "damages evidence was not sufficiently related to * * * the government's negligent estimates," Pet. App. 12a, and that it therefore "fail[ed] to provide the basis for a damages award." *Id.* at 13a.[2]

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[2] Petitioner cites no government contract decision that departs from established principles precluding recovery for speculative damages. Instead, it points to formulations utilized in other legal contexts that present a variety of different considerations in proving damages. See *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983) (National Labor Relations Act); *J. Truett Payne Co., supra* (Clayton Act, as amended by Robinson-

2. In contending that the courts below employed an inappropriately high standard of proof by requiring petitioner to "pinpoint the precise amount of damages," Pet. 12, petitioner mischaracterizes the decisions below.

At trial and on appeal, petitioner relied on two theories of damages, both of which were based on unsupported assumptions. First, petitioner's contract reformation theory hypothesized that if the Army had disclosed "facts" regarding planned troop reductions, Army maintenance of computers, and new computer purchases, then petitioner would have anticipated a specific reduced level of call volume (8500 per year), and would have increased its bid prices by a large amount. Pet. App. 26a-28a.[3] The trial court found this theory to be fundamentally flawed because petitioner introduced no evidence as to how its original bid was prepared, and offered only unsupported speculation as to how an

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Patman Act); *Mount Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274 (1977) (First and Fourteenth Amendments); *Anderson* v. *Mount Clemens Pottery Co.*, 328 U.S. 680 (1946) (Fair Labor Standards Act); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) (Sherman Act and Clayton Act); *Palmer, supra* (Bankruptcy Act); *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940) (Copyright Act of 1909); *Story Parchment Co., supra* (Sherman Act); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927) (Sherman Act and Clayton Act); *Hetzel* v. *Baltimore & Ohio R.R.*, 169 U.S. 26 (1898) (local District of Columbia law). Congress has, however, conferred generally exclusive jurisdiction on the Federal Circuit to hear appeals arising in government contract cases, see 28 U.S.C. 1295(a)(3) and (10), in recognition that "[g]overnment contract law is a specialized * * * field." *Quality Tooling, Inc.* v. *United States*, 47 F.3d 1569, 1580 (Fed. Cir. 1995).

[3] Petitioner did not specifically allege which "facts" were important to its bid, or why their disclosure would have reduced petitioner's expected call volume to 8500 per year.

Army disclosure statement would have affected the preparation of its bid. *Id.* at 28a-30a. In rejecting the contract reformation theory, the trial court found that petitioner's witness had a "complete lack of familiarity with the formulation of the original bid." *Id.* at 30a. The court therefore rejected petitioner's "hypothetical bid" because of its "speculative nature." *Ibid.*

As an alternative to its contract reformation theory, petitioner offered an "increased costs" claim—a damages calculation based on a series of assumed increased costs. Pet. App. 22a.[4] Petitioner contended that the lower-than-expected volume of service calls caused its actual fixed costs to be borne by less revenue than it had anticipated. *Id.* at 31a. Petitioner claimed entitlement to the difference between the actual revenue it received and the "estimated" revenue that it would have received, minus the costs that petitioner claims it would have incurred in performing the increased volume of service calls. *Ibid.* The trial court, however, found that "[s]ubstantial questions surround the components of [petitioner's] increased cost claim calculation." *Id.* at 32a. The trial court determined that because the calculation relied on unsupported suppositions concerning the components of petitioner's original bid prices and employed a highly questionable method of cost categorization, the increased cost claim lacked a sound foundation. *Id.* at 33a. The trial court also determined that petitioner's failure to provide contemporaneous evidence of its originally projected call volume,

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[4] The fact that petitioner's two damages theories produced dramatically different claim amounts—6,285,445 and 3,773,324 German deutsche marks, respectively, Pet. App. 22a—is an additional indication that neither theory contained the requisite reasonable specificity.

anticipated costs, and bid price calculations rendered petitioner's increased cost calculation inherently unreliable. *Id.* at 33a. Accordingly, this was a simple case of failure of proof.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Moreover, we note that this case is in an interlocutory posture. As noted above, the court of appeals vacated the trial court's grant of summary judgment on the issue of manufacturers' warranties and remanded for trial on whether the Army "purchased" those warranties within the meaning of the contract. See Pet. App. 2a, 9a-12a. The measure of damages, if any, owed to petitioner will not finally be determined until the completion of that part of the case.